No. 48728-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Trygve Nelson,

Appellant.

Lewis County Superior Court Cause No. 13-1-00446-6

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. Both of Mr. Nelson's convictions for third-degree assault violated his Fourteenth Amendment right to due process because they were based on insufficient evidence.
2. The state failed to prove that DeLapp and Ross were performing "nursing or health care duties" when they unlawfully restrained Mr. Nelson.
3. The state failed to prove the absence of self-defense beyond a reasonable doubt.

> **ISSUE 1:** A conviction for third-degree assault of a health care worker requires proof that she or he was performing "nursing or health care duties at the time of the assault." Did the state fail to prove third degree assault because neither DeLapp nor Ross were performing nursing or health care duties when they unlawfully restrained Mr. Nelson?
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> **ISSUE 2:** Where the testimony includes some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the state fail to prove the absence of self-defense?

4. Mr. Nelson's conviction for third-degree malicious mischief violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
5. The state failed to prove that Mr. Nelson caused physical damage to property of another.

> **ISSUE 3:** A conviction for third-degree malicious mischief requires proof of physical damage. Did the state fail to prove physical damage, where there was no evidence of material injury to property?

6. The court erred by ordering Mr. Nelson to pay $1881 in discretionary legal financial obligations absent any inquiry into his present ability to pay.
7. Given Mr. Nelson's mental health condition, the court erred by ordering him to pay $2181 in legal financial obligations other than restitution and the crime victim's penalty.

ISSUE 4: A court may not order a person to pay discretionary legal financial obligations (LFOs) absent individualized inquiry into his ability to do so. Did the court err by ordering Mr. Nelson to pay $1881 in discretionary LFOs without the required individualized inquiry or finding of ability to pay?

ISSUE 5: An offender with a mental health condition is exempt from most legal financial obligations absent current ability to pay at the time of sentencing. Given Mr. Nelson's mental health condition, must the order imposing legal financial obligations be vacated for all amounts other than restitution and the crime victim's penalty?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 6: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Nelson is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Trygve Nelson suffered from mental illness and severe medical conditions. Pre-Trial Release Conditions filed 7/3/13, Motion for Order of Indigency filed 9/25/13, Supp. CP. He was in the hospital for intoxication. RP (9/19/13) 9, 30. The night before, he'd been arrested for fighting with police and taken to the hospital. RP (9/19/13) 9-11. Since he was unconscious and being admitted for care in the hospital, he was released from police custody. RP (9/19/13) 10, 11, 46.

After spending the night in the hospital, Mr. Nelson was cleared for discharge. RP (9/13/13) 95, 106-107. He got up to get dressed, and before he completed the task he defecated on the floor. RP (9/19/13) 11-12, 31, 96, 101. According to the nurse on duty at the time, Mr. Nelson may still have been intoxicated. RP (9/19/13) 33. Mr. Nelson had also been put on some medications while at the hospital. RP (9/19/13) 59.

Mr. Nelson pointed out what he'd done to staff. RP (9/19/13) 31. The nurse told him he had to clean it up and Mr. Nelson tried to leave his hospital room. RP (9/19/13) 31-32, 89. Nurse DeLapp told him he was not allowed to leave and moved into doorway to block it. RP (9/19/13) 32, 63-64. Mr. Nelson took two or three steps toward the door before contacting DeLapp. RP (9/19/13) 66.

Nurse Ross moved to help and they forcibly put Mr. Nelson into a stretcher. RP (9/19/13) 32-33. According to Rosst, Mr. Nelson tried to punch him while being forced onto the stretcher. RP (9/19/13) 90, 103, 107-108.

Both nurses acknowledged that they were aware that the police had not put a hold on Mr. Nelson. RP (9/19/13) 62. Nurse Ross said that while Mr. Nelson was cleared for discharge, he would not let him leave until he had cleaned up his feces. RP (9/19/13) 106-107, 114.

Police came and arrested Mr. Nelson. RP (9/19/13) 43. The nurses cleaned up the room. RP (9/19/13) 43, 109-110. Mr. Nelson was charged with two counts of assault in the third degree and malicious mischief in the third degree. CP 1-2.

The defense moved to dismiss the malicious mischief charge, since no property damage was alleged. RP (9/19/13) 5. The court denied the motion, agreeing with the state's argument that since the clean-up took staff time, the money loss was the mischief. RP (9/19/13) 6.

During trial, Nurse Ross admitted that forcing someone to stay at the hospital to clean up after themselves was not within his power. RP (9/19/13) 107.

Nurse DeLapp said that if he had not stepped in front of Mr. Nelson, Mr. Nelson would not have run into him in his attempt to leave the room. RP (9/19/13) 68.

The jury convicted Mr. Nelson as charged. CP 36. At sentencing, the state acknowledged that Mr. Nelson had mental health issues and was in treatment. RP (9/25/13) 4. Even so, the court issued a legal financial obligation that was not mandatory, $1800 in attorney fees. CP 42.

Mr. Nelson timely appealed. CP 48.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. NELSON OF THIRD-DEGREE ASSAULT.

Due process requires the state to prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *State v. Mau*, 178 Wn.2d 308, 312, 308 P.3d 629 (2013). Failure to do so requires dismissal with prejudice. *Id.*, at 317.

A. The state failed to prove that DeLapp and Ross were performing nursing or health care duties when they unlawfully restrained Mr. Nelson.

Conviction for third-degree assault of a health care worker requires proof that the person assaulted "was performing his or her nursing or health care duties at the time of the assault." RCW 9A.36.031(1)(i). Here, the state failed to prove that DeLapp and Ross were performing nursing or

health care duties. Accordingly, the convictions must be reversed and the charges dismissed. *Id.*

The altercation occurred when DeLapp and Ross attempted to prevent Mr. Nelson from leaving his hospital room. RP (9/19/13) 31-32, 90, 104, 107. Absent consent or legal authority, this restraint amounted to unlawful imprisonment, a class C felony.[1] RCW 9A.40.010(6); RCW 9A.40.040.

Mr. Nelson did not consent to be restrained: as the record makes clear, he was attempting to leave when DeLapp blocked his way and Ross grabbed him.[2] RP (9/19/13) 31-32, 90, 104, 107. Accordingly, the actions of DeLapp and Ross were criminal unless they had legal authority for the restraint. RCW 9A.40.010(6).

The state did not prove beyond a reasonable doubt that DeLapp and Ross had legal authority to restrain Mr. Nelson. There are two possible sources for such authority: the involuntary treatment act (RCW

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[1] A person is guilty of unlawful imprisonment if he or she "knowingly restrains another person." RCW 9A.40.040(1). The Supreme Court has determined that lack of consent or legal authority is merely definitional, and not an essential element of the crime. *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014) (addressing former RCW 9A.40.040 (1975), which has since been amended to include gender neutral language; *see* Laws of 2011, Ch. 336).

[2] Furthermore, he was brought to the hospital by the police; he did not seek admission on his own. RP (9/19/13) 9-11. The officers told hospital staff that Mr. Nelson was free to leave, and the state did not suggest he remained in police custody while at the hospital. RP (9/19/13) 9-11, 63.

71.05) and the common law privilege of citizen's arrest. Neither applies here.

First, a person may only be detained for involuntary treatment under RCW 71.05 if certain conditions are met. The state did not present sufficient evidence to justify detention under the involuntary treatment act (ITA) as it existed in 2013.

The state did not prove that hospital staff, a county designated mental health provider (DMHP), or police officer determined that Mr. Nelson had a mental disorder and presented an "imminent likelihood of serious harm," or that he presented an "imminent danger because of grave disability." Former RCW 71.05.050 (2013); former RCW 71.05.153(1) and (2) (2013). Nor did the state prove that the hospital held Mr. Nelson for no more than the time permitted by statute:[3] nothing in the record how long Mr. Nelson was at the hospital when he tried to leave. RP (9/19/13) 28-117.

Thus, the state did not present any facts justifying detention under the ITA. Nor did the prosecutor even argue that the ITA applied to the

[3] *See* Former RCW 71.050.050 (2013) (allowing up to six hours for the hospital to notify the DMHP, if detention was initiated by hospital staff); former RCW 71.05.153(3) and (4) (2013) (allowing detention for up to twelve hours, but requiring examination by DMHP within three hours, and final determination by DMHP within twelve hours, if detention initiated by a police officer). Hospitals have since been granted some flexibility in the timing, so long as they do not "totally disregard[ ] the requirements." Laws of 2015, Ch. 269, §§5 and 6.

actions of DeLapp and Ross. RP (9/19/13) 28-117. Indeed, by the end of trial, both DeLapp and Ross agreed that Mr. Nelson had been discharged by the doctor at the time of the altercation. RP (9/19/13) 106, 108-109, 114.[4] The ITA does not provide legal authority for the restraint imposed by DeLapp and Ross.

The second source of legal authority is the common-law privilege of citizen's arrest. *State v. Garcia*, 146 Wn. App. 821, 829, 193 P.3d 181 (2008). In the case of misdemeanors, the privilege applies only to an offense that "(1) constitutes a breach of the peace and (2) is committed in the citizen's presence." *Id.*, at 825; *State v. Malone*, 106 Wn.2d 607, 610 n. 1, 724 P.2d 364 (1986). The prosecutor did not argue this justification for the restraint at trial, and it does not apply here. RP (9/19/13) 28-117; RP (9/20/13) 20-27.

Mr. Nelson's conduct in defecating on the floor did not occur in DeLapp's presence. RP (9/19/13) 31, 70, 75, 114-115. Thus DeLapp had no basis to initiate a citizen's arrest. *Garcia*, 146 Wn. App. at 825, 829. Ross claimed that he was in the room[5], before admitting he was not in the

[4] Because of this, and in light of Ross's admission that he had no authority to hold Mr. Nelson against his will, it appears that both nurses failed to act "in good faith and without gross negligence." RCW 71.05.120(1). Accordingly, both might be civilly or criminally liable. RCW 71.05.120(1).

[5] RP (9/19/13) 94.

room[6]— so his authority for a citizen's arrest turns on whether or not Mr. Nelson's alleged crime amounted to a "breach of the peace." *Id.*

No Washington case has determined that malicious mischief constitutes a breach of the peace. The absence of such authority is apparently sufficient to defeat any claim that misdemeanor malicious mischief allows a citizen's arrest. *See, e.g., Garcia*, 146 Wn. App. at 829 ("in any event, no Washington case says that theft constitutes a 'breach of the peace.'")

Nor does malicious mischief qualify as a breach of the peace under the definition used in civil cases: "'a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order.'" *Ragde v. Peoples Bank*, 53 Wn. App. 173, 176, 767 P.2d 949 (1989) (citations omitted) (quoting *Stone Mach. Co. v. Kessler*, 1 Wn. App. 750, 754, 463 P.2d 651 (1970)). While Mr. Nelson's action may have been offensive, it was not a public offense, did not involve violence, and was not likely to cause an immediate disturbance of public order. *Ragde,* 53 Wn. App. at 176. It did not justify a citizen's arrest. *Garcia*, 146 Wn. App. at 825, 829.

Because the two nurses lacked legal authority, their misguided attempts to detain Mr. Nelson were not lawful. Whether characterized as a

[6] RP (9/19/13) 98. DeLapp confirmed that Ross was not in the room. RP (9/19/13) 117.

criminal assault, a civil battery,[7] or an unlawful imprisonment, their actions were not "nursing or health care duties." RCW 9A.36.031(1)(i).

The evidence was insufficient to convict Mr. Nelson of third-degree assault. His convictions must be reversed and the charges dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

B. The state failed to prove the absence of self-defense beyond a reasonable doubt.

An accused person is entitled to instructions on self-defense when there is "some evidence" demonstrating self-defense. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). This is so because "[w]here the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt." *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

In this case, the record—when taken in a light most favorable to Mr. Nelson[8]— includes "some evidence"[9] suggesting self-defense. Mr. Nelson had been discharged from the hospital when DeLapp and Ross attempted to restrain him. RP (9/19/13) 63, 106-107. His actions were

[7] A battery is an intentional and unpermitted contact with the plaintiff's person. *Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 87, 374 P.3d 245 (2016) (citing *Kumar v. Gate Gourmet, Inc.*, 180 Wash.2d 481, 504, 325 P.3d 193 (2014)).

[8] *See, e.g., State v. George*, 161 Wn. App. 86, 95-96, 249 P.3d 202 (2011).

[9] *McCreven*, 170 Wn. App. at 462.

thus an attempt to "prevent an offense against [his] person" and/or "the actual resistance of an attempt to commit a felony" upon his person. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.03 and WPIC 17.02 (3d Ed).

Because Mr. Nelson did not request self-defense instructions, the state was not required to persuade the jury that his actions were not self-defense. However, because the record contains "some evidence" of self-defense "the burden shift[ed] to the prosecution to prove the absence of self-defense beyond a reasonable doubt." *See State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In other words, the record on review must show the absence of self-defense beyond a reasonable doubt, even though the issue was not presented to the jury.[10]

Here, the state failed to prove the absence of self-defense. As outlined above, DeLapp and Ross lacked legal authority for the restraint, and thus committed assault and unlawful imprisonment. Mr. Nelson was authorized to use reasonable force resisting the attempt to restrain him.[11]

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[10] This argument can be raised for the first time on review for two reasons. First, because it is an element of the offense, failure to prove the absence of self-defense amounts to manifest error affecting the constitutional right to due process. Such errors may be raised for the first time on appeal pursuant to RAP 2.5(a)(3). Second, any deficiency in proving the absence of self-defense amounts to a "failure to establish facts upon which relief can be granted," subject to review under RAP 2.5(a)(2).

[11] Furthermore, Mr. Nelson was entitled to act on appearances in defending himself. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed).

The state's failure to disprove self-defense requires reversal of Mr. Nelson's assault convictions. The charges must be dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. NELSON OF THIRD-DEGREE MALICIOUS MISCHIEF.

To obtain a conviction for third-degree malicious mischief, the state was required to prove that Mr. Nelson "[k]nowingly and maliciously cause[d] physical damage to the property of another." RCW 9A.48.090(1)(a); CP 2, 15. The state failed to prove that Mr. Nelson caused physical damage.

The court instructed jurors that "'Physical damage,' in addition to its ordinary meaning, includes any diminution in the value of any property as a consequence of an act, and includes the reasonable cost of repairs to restore injured property to its former condition." CP 28; *see also* RCW 9A.48.100(1); *State v. Newcomb*, 160 Wn. App. 184, 192, 246 P.3d 1286 (2011). The ordinary meaning[12] of 'physical' is "of or relating to that which is material." *Dictionary.com Unabridged*, Random House, Inc.[13]

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[12] Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458,* 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

[13] Available at http://www.dictionary.com/browse/physical (last accessed August 18, 2016).

'Damage' means "injury or harm that reduces value or usefulness." *Dictionary.com Unabridged*, Random House, Inc.[14]

Mr. Nelson dirtied the floor of his hospital room. RP (9/19/13) 31. He did not cause material injury or harm. Nor was there any need to repair the floor; all that was required was cleaning. RP (9/19/13) 43. The state did not present evidence suggesting that the hospital floor diminished in value as a result of his actions. Any costs associated with that cleaning did not transform what Mr. Nelson did into physical damage.[15]

Because the state failed to prove physical damage, the conviction cannot stand. It must be dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

III. THE COURT SHOULD NOT HAVE ORDERED MR. NELSON TO PAY LEGAL FINANCIAL OBLIGATIONS.

Mr. Nelson was found indigent before and after trial. Order Appointing Attorney filed 7/3/13, Supp. CP; CP 49-50. He has no income from any source. Motion for Order of Indigency filed 9/25/13, Supp. CP. In addition, he has a mental health condition and is physically disabled. Pre-Trial Release Conditions filed 7/3/13, Motion for Order of Indigency

[14] Available at http://www.dictionary.com/browse/damage (last accessed August 18, 2016).

[15] The state did not charge Mr. Nelson with malicious mischief under RCW 9A.48.090(1)(b), which arguably does apply to his behavior. CP 1-2. A person is guilty under that subsection if he "[w]rites, paints, or draws any… mark of any type on any public or private building or other structure…" RCW 9A.48.090(1)(b).

filed 9/25/13, Supp. CP. The court did not conduct any individualized inquiry into his present or future ability to pay. RP (9/25/13) 3-21. The court imposed a total of $2681 in legal financial obligations. CP 42-43.

A. Mr. Nelson's mental health condition prohibits imposition of most financial penalties because the sentencing court did not find that he has the current means to pay.

A person with a mental health condition cannot be ordered to pay legal financial obligations (other than restitution and the crime victim's penalty) absent a finding that he has the current means to pay.[16] RCW 9.94A.777(1); *State v. Tedder*, 47012-8-II, 2016 WL 3577508, at *2 (Wash. Ct. App. June 28, 2016). Under the statute, a judge "must first determine" that the offender has the ability to pay. RCW 9.94A.777(1). This imposes a more concrete duty than RCW 10.01.160(3), which only requires the court to *consider* whether the person can pay.

Here, the court knew that Mr. Nelson suffered from a mental health condition. RP (9/25/13) 3-4; Pre-Trial Release Conditions filed 7/3/13, Supp. CP. The court did not determine that Mr. Nelson has the ability to pay LFOs. RP (9/25/13) 3-21.

[16] For purposes of the statute, "mental health condition" is defined as: "a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation." RCW 9.94A.777(2).

Because the court did not find a current ability to pay, it lacked authority to impose legal financial obligations other than restitution and the crime victim's penalty. RCW 9.94A.777(1). The order imposing financial penalties must be vacated, with the exception of the $500 crime victim's assessment. RCW 9.94A.777(1); *State v. Tedder*, 47012-8-II, 2016 WL 3577508, at *2 (Wash. Ct. App. June 28, 2016).

B. The court failed to make any particularized inquiry into Mr. Nelson's present or future ability to pay LFOs.

The court did not conduct any particularized inquiry into Mr. Nelson's financial situation at sentencing or at any other time. RP (9/25/13) 3-21. Instead, the court adopted boilerplate language indicating that it "ha[d] considered" his present and future ability to pay, including her resources and the likelihood that his status would change. CP 39. However, the court did not find that he has the ability or likely future ability to pay. CP 39.

Nothing in the record suggests the court actually considered the factors indicated. The court erred by ordering Mr. Nelson to pay discretionary LFOs absent evidence that he will ever have the means to do so.

The legislature has mandated that a court "'*shall not* order a defendant to pay costs unless the defendant is or will be able to pay

them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)) (emphasis in *Blazina*).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

Here, the court failed to conduct any inquiry into Mr. Nelson's ability to pay LFOs. RP (9/25/13) 3-21. The court found him indigent before and after trial. Order Appointing Attorney filed 7/3/13, Supp. CP; CP 49-50. Had the court considered Mr. Nelson's mental health condition, his physical disability, his lack of income, and his felony convictions, the court would not have ordered discretionary LFOs. In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

C. The Court of Appeals should review the erroneous imposition of financial penalties and vacate that portion of the judgment and sentence.

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 182 Wn.2d at

835. The *Blazina* court found that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*[17] This court should follow the Supreme Court's lead and consider the merits of Mr. Nelson's LFO claims even though they were not raised below.

The court erred by ordering Mr. Nelson to pay $1881 in discretionary LFOs absent any showing that she had the means to do so. *Blazina*, 182 Wn.2d at 838. Furthermore, the imposition of LFOs (other than restitution and the crime victim penalty) is inappropriate, given Mr. Nelson's mental health condition. RCW 9.94A.777.

The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in

[17] The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85.

advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *Blazina, supra.* Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

Mr. Nelson has been convicted of felonies. He has a mental health condition, a physical disability, no income, and no resources. Pre-Trial Release Conditions filed 7/3/13, Motion for Order of Indigency filed 9/25/13, Supp. CP; CP 49-50; RP (9/25/13) 3-4. The trial court determined that he is indigent for purposes of this appeal. CP 49-50. There is no reason to believe that status will change. As noted above, the *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Blazina,* 182 Wn.2d at 835.

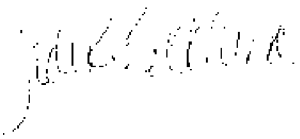
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, Mr. Nelson's convictions must be reversed and the charges dismissed with prejudice. In the alternative, the court must vacate the legal financial obligations imposed (except for the crime victim's penalty). If the state substantially prevails on review, the court should decline to impose appellate costs.

Respectfully submitted on August 23, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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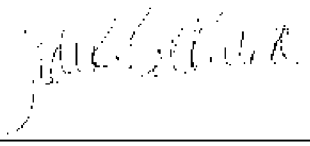
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 23, 2016.



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